Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access 220, LLC	)	WT Docket No. 02-224
	)	
Request for Waivers with Associated	)	
Proposed Conditions to Establish	)	RM-9664
Band Manager Status in 220-222 MHz	)	

Reply Comments
Supplement

Warren C. Havens ("Havens") and Telesaurus Holdings GB, LLC ("Telesaurus"), together DBA LMS Wireless ("LMSW"), hereby reply to the supplemental reply comments of Access 220 ("Access") in this proceeding (the "Access Supplement"). The Access Supplement contains mischaracterizations by Access and Wiley Rein & Fielding ("Wiley")[1] of the LMS Reply Comments. The mischaracterizations are not legitimate replies but are grossly misleading, thus LMSW responds to corrects the record.[2]

[1] Wiley Rein & Fielding is a law firm representing Access as well as Motorola. See website of Access Spectrum at http://www.accessspectrum.com: Motorola holds equity and a director position in Access Spectrum, the parent company of Access 220 (see the waiver request, page 1) and the Industrial Telecommunications Association ("ITA") also holds equity in Access Spectrum via it wholly owned subsidiary, Spectrum Equity, Inc. Both submitted Comments in this proceeding in support of this "waiver" request. These interests are not disclosed in the Comments of Motorola and ITA, and without such disclosures, these Comments appear to be independent but are not.

[2] As stated in its Reply Comments, LMSW wishes Access success in 220 MHz, and has compatible interests with Access regarding use of Motorola equipment and service to UCT members. But the instant waiver request overreaches and fails under the standards, and the mischaracterizations strain these interests and credibility.

First, Access misrepresents the Reply Comments of LMSW (Havens and Telesaurus) as coming from Havens. Havens and Telesaurus are distinct entities, each FCC licensees, and Access should not attempt to obscure or confuse this.

Access proclaims that the LMSW Reply Comments were "primarily . . . to advocate his own proposals for the 220 MHz band (this, addressed below), and under cover of that initial smokescreen, it then sidesteps by mischaracterization and omission the procedural and substantive problems in its waiver request that clearly LMSW pointed out, in attempt to manufacture a basis for its conclusion that LMSW (and others) "failed to address meaningfully the merits of [its] request." In fact, it is Access that failed to respond to the clear defects LMSW pointed out in its "waiver" request. And it is Access, not LMSW, that initiated in this proceeding a proposal for major new rules in 220 MHz, to which LMSW properly responded.[3]

Contrary to the Access Amendment, LMSW did indeed "address meaningfully the merits of [its] request," both as to procedure and substance. To start, on the substance, LMSW pointed out that the Access request simply did not meet the waiver standards required in the applicable rule, §1.925.[4] Under this rule, to obtain a waiver, a petitioner must demonstrate either under

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[3] Similarly misleading is its closing "[T]he record strongly supports grant of the requested waivers. . . . In actuality, there is no credible or substantive opposition to ASL's request." The record that counts is that which satisfies §1.925 and the public interest. The request the request fails to provide this. There is indeed "credible and substantive opposition" in filings representing LMSW (Havens and Telesaurus) and 46 (see text below) electric companies (LMSW has not reviewed the Bizcom filing). And there were only *two* non-affiliated entities (see footnote 1 above regarding Motorola and ITA) that provided support, one electric cooperative in Colorado, and UTC whose support was described as based on need by its Critical Infrastructure members for spectrum, and in this regard the LMSW proposal, submitted after the UTC Comments, would meet that need directly. (Large entities such as utilities want to own spectrum, not lease.) In any case, no supporting comments, including from the two affiliated ones, gave any evidence or arguments to supplement what Access provided in its request.

[4] LMSW incorrectly cited §1.945 in its Reply Comments as the rule regarding waivers. It meant §1.925.

§1.925(3)(i) that application of the subject rule in the petitioner's particular case would frustrate the underlying purpose of that rule and grant of the waiver request would be in the public interest, or under §1.925(3)(ii) that application of such rule in such particular case would be inequitable, unduly burdensome, or contrary to the public interest, or that the petitioner has no reasonable alternative than the requested relief. As LMSW pointed out in its Reply Comments, the Access waiver request fails under both criteria.[5] LMSW pointed out that any 220 MHz licensee could make the same arguments Access has provided that have any relevance to the request, which are that it holds (or for Access, planned to hold, see below) 220 MHz licenses and it would like to try out guard-band licensing. LMSW pointed out that the other assertions by Access are irrelevant to the standards to be met: including the fact that it is a band manager in 700 MHz, the size of its contemplated (see below) 220 MHz license holdings, its alleged special relation with Motorola, its plan to buy other 220 MHz licenses (aided by the grant of the special advantage of the requested waiver: see below), its alleged financial capability, its alleged success as a band manager to date, etc.[6]

Further, contrary to Wiley-Access, LMSW in its Reply Comments accurately noted that Access 220 was not merely seeking a waiver, but relief that would implement a new licensing scheme, under a long set of rules it listed, for licenses sought to hold. It does indeed ask for

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[5] The fundamental but not sole reason LMSW raises this and the other deficiencies in the Access waiver request is its strong belief, based on long experience, that without fair and consistent application of rules, the integrity of the regulatory foundation for the subject wireless service disintegrates, the service suffers, and the Commission and licensees waste time in adversarial proceedings.

[6] Nor did Access substantiate these and other assertions in any of its three filings in this proceeding, as would be required in a showing under §1.925 if they were of relevance, and as be needed for credibility in general. It asserts on page two: "great" strides, "wholly new," "exhaustive," "extensive," "significant," "broad," "exceedingly." These adjectives only beg for substance, but none is given.

"replacement of rules by other rules." In its own words it proposes on page 3 "condition[s] [of its] waiver request . . . band manager operating requirements," and then presents these in a page of single-spaced rules, citing rule sections. This is exactly what LMSW said it was, which Access now denies. As LMSW accurately noted, this proposal is far more than a waiver request. This could not be more clear in that what it is proposing is licensing scheme under existing rules, as it discussed at length in its request.[7] There is nothing in the rule section on waivers, §1.925, that provides for such relief: for replacing some rules with others or derivatives thereof. Access wants by waiver what has been properly promulgated by notice and comment rulemaking in the 700 MHz band, and is being properly considered in the Secondary Markets proceeding for many bands.

In addition, Wiley-Access mischaracterize LMSW's comment regarding its seeking relief for licenses it did not hold. First, in its waiver request, Access described "soon to be acquired 220-222 MHz licenses" (page 1) and that "Aerwav licenses . . . will be assigned, subject to FCC approval, to Access 220. . . ." In its Access Supplement, it writes that the FCC has approved of this assignment, listing a date that is *after* the date of the waiver request filing. The issue LMSW raised is still valid: a party should not petition the FCC nor should the FCC accept and proceed with a petition that involves licenses not yet held by the petitioner. To do otherwise, as LMSW wrote, is at least a potential waste of Commission and responding parties time.

But the major mischaracterization by Wiley-Access regarding LMSW's comment on this issue of seeking relief for licenses not yet held is to suggest that LMSW was only discussing the Aerwav licenses and not also, as LMSW clearly wrote on page 3, the "220 MHz licenses Access

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[7] As noted by LMSW in its Reply Comments, this is further illustrated by the fact that the Commission is in the process of completing the Secondary Markets proceeding which is expected to allow leasing, similar to what Access seeks for itself via a "waiver."

describes that it may in the future acquire, for which it also seeks relief at this time." What access requested was: " . . .any waiver relief granted here should be extended to include any after-acquired 220-222 MHz licenses . . . ." (page 8, and footnote 9)[8] Access far overreached here and LMSW pointed it out. Access should not now act as if it did not make this request or as if LMSW did not squarely address this. : LMSW properly pointed out the obvious problems in such a request and any grant thereof, including that it would constitute a grant of rights or interests in licenses to a party that did not hold the licenses.[9]

By piecing together a few of the many elements of the LMSW Reply Comments, Wiley-Access tries to suggest that LMSW agreed that band manager status would solve the problems in 220 MHz and that, since it had (after filing its "waiver" request) obtained the Aerwav licenses, the one issue LMSW raised in that regard disposed of the many LMSW objections. As shown above, that is not at all the case. And as discussed in footnote 7 herein, even Access describes

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[8] See page 8 of the Access request. It proposes "to realize the potential of the 220-222 MHz band . . . . if the Commission permits [it] to operate as a band manager . . . . [by] channel aggregation to meaningful bandwidths . . ." This plan to seek "meaningful bandwidth" was repeated in footnote 9, cited above: ". . . meaningful bandwidth for private users." This plan to become the entity to consolidate and realize the band provides no basis for grant under §1.925 for either the licenses it now holds or those it hopes to buy.

Rather, it undermines this request regarding the licenses it holds, since it has explained that they need supplementing with more spectrum to constitute "meaningful bandwidth for [the] private users," the parties it would serve if its gets band-manager status. Apart from other defects, it is obviously improper to ask the Commission to grant relief, that provisions a possible fishing trip, to try to make the relief meaningful: "if the Commission permits ASL to operate as a band manager at 220 MHz and if AFL's financial projections . . . materialize" then it "intends . . . . [to pursue] channel aggregation to meaningful bandwidth for spectrum users."

[9] Section 310(d) of the Communications Act forbids transfer or disposal in any manner of any rights to licenses without Commission approval. A license is only a set of rights and conditions to use spectrum. In the above-noted part of its request, what Access asks it that it be uniquely granted, for a class of licenses, license rights and conditions that do not yet exist in the rules for such class, on a blank-check basis, which it can then bestow upon licenses if and when it acquires them. It is an untenable proposal under statutes, rules and equity.

lack of meaningful bandwidth as the real problem, and describes band manager status as a condition and enabler of its mission to be the party to solve that problem.

Thus, by pointing to this most fundamental problem in the whole band, and then asking relief to facilitate it in becoming the solution, Access squarely supports the LMSW alternative proposal over its own in that (i) the LMSW proposal directly addresses this problem: it is a plan to facilitate and ultimately require consolidation of narrow channels into wider ones in 220 MHz, and to consolidate 220 MHz with adjacent bands, and (ii) the LMSW plan is more competitive and fair in that it does not involve a special grant enabling Access in this consolidation solution.

Finally, contrary to Wiley-Access, LMSW had a sound basis for presenting in its Reply Comments this alternative proposal for reform of 220 MHz. The basis is, as shown in the LMSW Reply Comments and again above, that this "waiver" request by Access is in fact a request for major new rules, not relief from existing ones under §1.925. The Commission chose to put such a request on notice. LMSW properly responded, not only pointing out deficiencies of the request if processed as a waiver request, but also outlining an alternative to what LMSW believes the request actually stood for, new rules to solve what both Access and LMSW (and others who commented, including forty six electric cooperatives)[10] believe is the real problem—

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[10] The Comments of Data Comlink, Inc. ("DCL") represented 20 partner electric cooperatives and allied companies, whose names are listed. The Reply Comments of the North Carolina Electric Membership Corporation ("NCEMC") represented its 26 listed electric cooperative company members. Both of these filings suggested, as did LMSW, spectrum consolidation with adjacent bands, including for technical reasons that LMWS did not point out (the 1 MHz transmit/receive separation in 220 MHz is so close as to diminish spectrum use and sometimes render use unfeasible at certain sites: expanding the service band would allow for wider splits alleviating this problem and thus increasing spectrum efficiency).

Regarding Comments of Motorola and UTC, these entities have elsewhere at least commented on the need for more spectrum

not lack of right to lease spectrum (which is not much good except for temporary and smaller applications), but lack of consolidated spectrum.[11]

Respectfully submitted,

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They also rightly suggest that grant of the Access request would lead to *de facto* new rules (DCL, p. 13. NCEMC, p.4).

[11] As LMSW pointed out in its Reply Comments, the LMSW proposal also would greatly benefit Public Safety and Critical Infrastructure. That is clearly in the public interest, as these sectors need more spectrum, including for Homeland Security, especially in this VHF range ideal for cost-effective wide-area coverage. (See documents and dockets cited in the LMSW Reply Comments.) In contrast, there is no clear public interest in expanding band management. Band manager companies are not, as Access suggests, some kind of public-servant operations as is government and non-profit organizations, and not surrogates for the FCC including since they must serve its shareholders interests, not the public interest. Band management is an experiment, and there is no proof, after some years now, of significant success. If there was a success, Access would have described and documented it. Also, more flexible leasing under the Secondary Markets proceeding could supercede band management.